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IN THE

Supreme Court of the United States

OCTOBER TERM — 1953

No. 145

CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement	11
Reasons for allowance of Writ	18
Summary of Argument	19
Argument	24

I SECTION 1252(b) 8 USC, 66 STAT 208 FAILS TO MEET THE CURRENTLY PREVAILING STANDARDS OF FAIRNESS AND IMPARTIALITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT 24

II ADMINISTRATIVE HEARINGS IN DEPORTATION CASES MUST CONFORM TO THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT 30

III THE DEPORTATION HEARING GIVEN PETITIONER WAS UNFAIR BECAUSE THERE WERE ABSENT ELEMENTS DEEMED ESSENTIAL TO DUE PROCESS 34

IV SECTIONS 1251 (a) (11) AND SECTION 1251 (d) 8 USC 66 STAT 204, ARE RETROACTIVE IN EFFECT AND VIOLATE THE EX POST FACTO CLAUSE OF THE CONSTITUTION OF THE UNITED STATES (ARTICLE I, SECTION 9, CLAUSE 3) 35

INDEX

Page

V THE ISSUANCE OF A CONFIDENTIAL LIST OF UNDESIRABLE ALIENS, INCLUDING THE NAME OF PETITIONER, BY THE ATTORNEY GENERAL IN 1952, and PREJUDICIAL PUBLICITY, AT THE TIME OF PETITIONER'S ARREST, BY THE ATTORNEY GENERAL P R E J U D G E D PETITIONER'S CASE BEFORE THE SPECIAL INQUIRY OFFICER AND THE BOARD OF IMMIGRATION APPEALS. 36

Conclusion 40

Prayer for Relief 40

Appendix A—Opinion United States Court of Appeal 5th Circuit May 6, 1954 I

Appendix B—Decision — Board of Immigration Appeals June 1, 1953 XVII

Appendix C—Decision — Special Inquiry Officer, March 4, 1953 XXXV

Appendix D—Decision — Special Inquiry Officer February 20, 1953 XXXIX

III.

CITATIONS

Page

Belizaro v Zimmerman, 3 Cir. 200 F 2d 282 34

Galvan v. Press, Sup Ct U S May 24, 1954 ..... 26, 35

Harisiades v. Shaughnessey (1952) 342 U. S. 580, 594 ..... 17, 34

Kwong Hai Chew v. Colding (1953) 344 U. S. 590 ..... 19, 25

Marcello v. U. S. (1952) 5 Cir. 196 F 2d 437 39

Palmer v. Ultimo, 7 Cir. 69 F 2d 1 34

Reynolds v. Dean, 7 Cir. 68 F 2d 346 34

Rubinstein v. Brownell, 206 4 (2d) 449 Affd 346 U. S. 929 ..... 17, 18, 33

The Japanese Immigrant Case 189 U. S. 86, 100-101 25

United States ex rel Accardi v. Shaughnessey (1954) 347 U. S. 260 ..... 17, 19, 21, 23, 35, 36

Wong Yang Sung v. McGrath (1950) 339 U.S. 33; 15, 17, 18, 19, 20, 21, 22, 25, 26, 31

IV.

LEGISLATIVE

Page

Constitution of the United States,
Article I, Section 9,
Clause 3 ..... 4, 16, 35

Fifth Amendment to the Constitution of the
United States 4, 15

Act June 28, 1940, Section 21, 22, 54 Stat.
673 ..... 10, 13, 23

Act September 27, 1950, Ch. 3, Section 101,
64 Stat. 1048 ..... 11, 15, 21, 31, 33

Immigration and Nationality Act of 1952, 8 USC
1101 et seq. 18

Immigration & Nationality Act of 1952, Section
403 (47) (66 Stat. 279-280) 11, 17, 21, 31, 33

United States Code:
Title 5, Sections 1004, 1004(c)
1006, 1007 ..... 9, 19, 20, 21, 22, 26, 27, 28, 30, 32, 33

Title 8, Section 156 (a) 12, 13

Title 8, Section 1101 (b)(4) (66 Stat. 166) 7, 20, 27

Title 8, Section
1251 (a) (11) (66 Stat 204) 3, 6, 13, 16, 22, 35

Title 8, Section 1251 (d) (66 Stat 204) 3, 7, 22, 35

Title 8, Section 1252 (b)
66 Stat 208 ..... 3, 4, 5, 6, 14, 15, 17, 21, 22, 24, 26, 30, 31

Title 8, 1254 (a) (5) 8

Title 26, Section 2591 ..... 12, 23

Title 28, Section 1254 2

Title 28, Section 2241 3

Title 28, Section 2253 3

V.

MISCELLANEOUS

	Page
Bestermann's Commentary — 1952 Immigration Act	
Congressional Record-Per Ed	31
Vol. 98 — p. 4416	21, 33
Vol. 98 — p. 5778	21, 32
Vol. 98 — p. 5779	22, 33
N. R. 6820 Sec. 342 (b) (3) 82nd Cong	36
N. Y. Times April 27, 1953	40
President's Commission on Immigration and Naturalization, Report January 1, 1953, Page 162	29
Regulations:	
8 CFR 242:51	20, 29
Rule 12, Federal Rules Court Procedure	24
S. Bill 2585 Sec 342 (b) (3) 82nd Cong	36

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Carlos Marcello, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, af-

firming a judgment of the United States District Court for the Eastern District of Louisiana discharging a Writ of Habeas Corpus and sustaining the validity of a deportation order issued against petitioner.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit was rendered on May 6, 1954, (R 33-49) and is not yet reported. It is appended hereto as appendix "A" (R I). A petition for rehearing was denied without opinion by the Court of Appeals on May 25, 1954 (R 59).

The opinion of the District Court was rendered June 8, 1953 (R 19-25) and is reported at 113 Federal Supplement 22.

The decision of the Board of Immigration Appeals, contained in the original exhibit offered by petitioner (R 18) is appended hereto as Appendix "B" (P XVII) and was rendered June 1, 1953.

The decisions of the Special Inquiry Officer were rendered on March 4, 1953 and February 20, 1953 and are contained in the original exhibit offered by petitioner (R 18). There are appended as Appendix "C" (P XXXV) and Appendix "D" (P XXXIX) respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

The jurisdiction of the United States Court of Appeals was invoked under 28 U.S.C. 2253.

The jurisdiction of the District Court was invoked under 28 U.S.C. 2241.

QUESTIONS PRESENTED

1. Whether Section 1252(b) 8 U. S. Code is violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currrently accepted standards for a fair and impartial hearing.

2. Whether deportation proceedings held pursuant to Section 1252(b) 8 U. S. Code are exempted from the purview of the Administrative Procedure Act (5 U. S. Code 1001, et seq.)

3. Whether to the extent the proceedings prescribed by Section 1252(b) 8 U. S. Code are inconsistent with the provisions of the Administrative Procedure Act, supra, the requirements of the latter Act are inapplicable to the deportation proceedings.

4. Whether Section 1252(b) 8 U. S. Code requires compliance with the Administrative Procedure Act insofar as it relates to separation of functions.

5. Whether the retroactive provisions of Section 1251(a)(11) and Section 1251(d) U. S. Code are unconstitutional as violative of Article I, Section 9, Clause 3 of the Constitution of the United States.

6. Whether the unfavorable publicity initiated by the Attorney General and the presence of petitioner's name on the Attorney General's list of unsavory persons to be deported prejudiced the entire proceeding and rendered it unfair.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part, as follows:

> "No person shall — be deprived of life, liberty or property without due process of law."

Article I, Section 9, Clause 3 of the Constitution of the United States provides:

> "No bill of attainder or ex post facto law shall be passed." (by Congress)

Section 1252(b) Title 8, U. S. Code (Section 242(b) Immigration and Nationality Act of 1952) provides in part as follows:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including order of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding be-

fore a special inquiry officer, at which the alien shall have a reasonable opportunity to be present . . . "

"In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General Shall prescribe.

Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section . . . " (66 Stat. 208)

Section 1251(a)(11), Title 8, U. S. Code (Section 241(a)(11), Immigration and Nationality Act of 1952 provides in part as follows:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regula-

tion relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or cocoa leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (66 Stat. 204)

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

Section 1101(b)(4) 8 U. S. Code (Section 101 (b) (4) Immigration and Nationality Act of 1952 reads as follows:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified

classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General shall prescribe." (66 Stat. 166)

Section 1254(a)(5), Title 8, U. S. Code provides in part as follows:

"As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who — . . ."

"(5) is deportable under paragraph . . . (11) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States; . . . has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting grounds for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and

> is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence." (66 Stat. 214)

Section 1004(c) Title 5, U. S. Code (Administrative Procedure Act (Section 5 (c) reads in part as follows:

> "Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any persons or party on any fact in issue unless upon notice or opportunity for all parties to participate; nor shall such officer be responsible to or subject to supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case, shall, in that or a factual related case, participate or advise in the decision, recommended decision, or agency review, pursuant to section 1007 of this title, except as witness or counsel in public proceedings." (60 Stat. 239)

The Administrative Procedure Act provides in part in Section 7(a), 5 USC 1006 (a), (60 Stat. 241) as follows:

> "In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with Section 1007 of this title shall be conducted in an impartial manner.
* * * * * "

Act June 28, 1940, Public Law No. 670 Ch. 439, Title II, Section 21, 54 Stat. 673, amending Title 8, Section 155 and 156 (a) (now repealed) read in part as follows:

"Sec. 21. The Act entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics' approved February 18, 1931 is amended—

(1) By striking out the words "and sentenced"
. . . . . .
(3) By inserting after the word 'heroin' a comma and the word 'marihuana.'

"Sec. 22. No alien shall be deportable by reason of the amendment made by Section 20 or 21 on account of an act committed prior to the date of the enactment of this Act."

Act of September 27, 1950, Public Law 843, 81st Congress, 2nd Sess. C 1052 Ch. III, Section 101, 64 Stat. 1048, reads as follows:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act (5 USC 1004, 1006, 1007)"

Section 403 of the Immigration and Nationality Act of 1952, Paragraph 66 Stat. 279-280, provides in part as follows:

> "(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
>
> * * * * *
>
> (47) The paragraph headed: "General provisions-Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951, (Public Law 843, Eighty-first Congress)."

STATEMENT

The record shows petitioner was born on February 10, 1910 in Tunis, Africa, of Italian parents. His father, now dead, was naturalized in 1942 and his mother, living, applied for naturalization but was rejected on educational grounds.

Petitioner entered the United States at New Orleans, Louisiana, for permanent residence on October 7, 1910. He has been continuously in the country except for a visit of an hour or so to Mexico in 1936 or 1937.

Petitioner is now 44 years old, has a living wife and four minor children, all born in this country. (Original Immigration Record, Exhibits 2 and 3, pp. 17, 18. Hearing February 16, 1953).

On October 29, 1938, petitioner was sentenced to imprisonment in the Atlanta Penitentiary for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The indictment charged a violation of the Marihuana Tax Act of 1937 (26 U. S. Code Section 2591). The first count charged that on or about December 6, 1937, he transferred to another individual a quantity of marihuana which transfer was not made pursuant to a written order on the required form as provided by the Act. Count two charged a similar transfer of marihuana on or about December 19, 1937.

The sentence imposed by the Judge of the United States District Court for the Eastern District of Louisiana was a general sentence on the two counts, not specifying the particular count or counts upon which the sentence was based. Petitioner served his sentence in the Penitentiary until conditionally released therefrom. (Exhibit No. 41, Hearing Feb. 16, 1953 p. 18-19).

At the time of petitioner's conviction, a violation of the marihuana law was not a ground for deportation under the then existing provisions of law, namely, Section 156(a),

Title 8, U. S. Code. Such marihuana violation was not made a deportable offense until June 28, 1940 and, even then, under Section 22 of the Act of June 28, 1940, 54 Stat. 673, amending Section 156(a), the provisions of the Act did not apply to convictions prior to June 28, 1940. So petitioner had a congressional pardon on deportation until the effective date of the present Act, December 24, 1952 when all limitations were removed and the provisions of the Act made retroactive to all convictions after entry into the United States.

The record shows no conviction of any offense by petitioner since his conviction in 1938.

Petitioner was first arrested by the Immigration and Naturalization Service on December 30, 1952, under a warrant charging him with a violation of Section 1251(a)(11) Title 8, U. S. Code (Section 241(a)(11) of the Immigration and Nationality Act of 1952) in that he was convicted of a violation of a law relating to the illicit traffic in narcotic drugs and, secondly, in that he was convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana. The warrant was, of course, based upon his one conviction on October 29, 1938, as heretofore described. (Exhibit No. 1, Hearing February 16, 1953 p. 15).

At the time of the petitioner's arrest, the Attorney General announced in a special press release issued in Washington and New Orleans that petitioner's arrest was part of a campaign to rid the country of undesirable alien criminals. It also listed at length his alleged criminal record and activities. (Exhibit No. 7. Hearing February 16, 1953, p. 24).

After his release on $5,000.00 bail, petitioner was given a hearing before a special inquiry officer purportedly under the provisions of Section 242 (b) Immigration and Nationality Act of 1952 (Section 1252 (b) Title 8, U. S. Code) on February 16, 1953. Four days later, on February 20, 1953, an order of deportation was issued by the Special Inquiry Officer based on the grounds stated in the warrant (Appendix D & C).

At this hearing, petitioner objected to the entire proceeding on the ground that Section 1252 (b) 8 U. S. C. was violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because (1) the investigative and prosecuting functions of the special inquiry officer is commingled with his adjudicative functions and (2) such officer is amenable by law to the supervision of the Attorney General whose responsibility it is to enforce the deportation statutes. Further, in this connection, that the highly prejudicial press release of the Attorney General issued prior to the hearing, amounted to a prejudgment of his case.

The further objection was made that Sections 1251(a)(11) and 1251 (d), U. S. C. are retroactive in effect and violative of the ex post facto clause of the Constitution.

These objections were all made at the outset of the hearing and after they were overruled, petitioner proceeded only with full reservation of his objections (Hearing Feb. 16, 1953 p. 7-16).

Petitioner timely appealed to the Board of Immigration Appeals. Subsequent to the taking of the appeal, petitioner made application for a reopening of the case to the special inquiry officer for a suspension of deportation under the provisions of Section 1254 (a)(5) Title 8, U. S. Code. The application was denied by that officer on the ground that petitioner had declined to seek such relief on the first hearing. On June 1, 1953, 22 days after a hearing, the Board of Immigration Appeals affirmed the decision of the special inquiry officer and additionally decided petitioner was not a person of good moral character and not entitled to suspension of deportation. Petitioner was rearrested on June 2, 1953 and denied bail. A petition for a writ of habeas corpus was filed June 2, 1953 (R 2-13).

This petition alleged all of the facts previously set out in this statement and additionally alleged that the deportation order was null and void and petitioner was illegally restrained on the ground the Section 1252(b) 8 U. S. C. was unconstitutional and violative of the Due Process Clause of the Fifth Amendment in that it did not meet the standards of fairness and impartiality required in a hearing and that said Section did not comply with the provisions of the Administrative Procedure Act to which deportation hearing were amenable under the authority of *Wong Yong Sung v. McGrath,* 339 U. S. 33. The petition also pointed out that the rider, 64 Stat 1048, exempting such proceedings from the provisions of the Administrative Procedure Act was expressly repealed by the 1952 Immigration Act (Par. VI, VII, VIII, IX, X, XI, (R 4-8). It was further alleged that the case of petitioner had been prejudged and rendered unfair from its inception because of inflammatory publicity initiated by the Attorney General and by the

inclusion of petitioner's name on a list of persons the Attorney General desired to deport (Par. XI-XII) (R 7-8).

It was further alleged that Sections 1251 (a) (11) and Sections 1251 (d) 8 U. S. Code were retroactive in effect and violative of the ex post facto clause of the Constitution; that petitioner's offense was not a ground for deportation in 1938 when convicted and upon being made such ground, he was excluded from the effect of the statute; that he had been caught unawares and had not been adequately forewarned of the consequences of his offense by the enactment of the present law (Par XV to XVIII) (R 9-10). Further that the action of the special inquiry officer in refusing a hearing to petitioner on his application for suspension of deportation was illegal, arbitrary and capricious (Par. XX R-11). The petitioner prayed for discharge of petitioner (R-12).

Respondent in his return produced the full record of the deportation proceedings and contended petitioner was properly found deportable and that the deportation hearing was conducted in accordance with the constitution, laws and regulations of the United States (R 15-16).

The writ was issued (R-14) and a hearing held June 5, 1953, when the matter was taken under advisement by the Court (R-17). On June 8, 1953, validity of the deportation order was upheld and the writ discharged (R-25). Written reasons for the decision were given by the Court (R 19-24) and the release of petitioner on $10,000.00 bail was ordered in the event of an appeal from the Order of the District Court (R-24). Notice of appeal was filed June 8, 1953, and petitioner is now at liberty under the bail as fixed by the

Court (R 26-27-28). The lower Court in its reasons for judgment did not consider or pass upon the denial of the application for suspension of deportation.

The Court of Appeals affirmed on May 6, 1954, holding that while the procedure prescribed by Section 1252(b) 8 U. S. C. clearly was not in accord with Section 5(c) of the Administrative Procedure Act, the requirements of the latter Act were inapplicable to deportation proceedings as the procedure set forth in 1252(b) prevailed (R 37-40). It was further held *Sung v. McGrath*, 339 U. S. 33 was no longer applicable and that *Rubinstein vs. Brownell*, 206 F (2d) 449, affirmed 346 U. S. 929 had no application. Although the record shows no denial by the respondent of the existence of the Attorney General's proscribed list of aliens and of the presence of petitioner's name on the list, that the recent decision in *Accardi v. Shaughnessey*, 347 U. S. 260, was not inconsistent with the Court's holding that petitioner's case had not been prejudged by reason of such list and prejudicial publicity initiated by the Attorney General (R 44-45-48).

It was further held that deportation acts are not subject to the constitutional prohibition against ex post facto laws on the authority of *Harisiades v. Shaughnessey*, 342 U. S. 580, 594 and cases cited (R-46).

It was further decided that the Board of Immigration Appeals properly exercised its discretion in determining that petitioner was not entitled to a suspension of deportation (R-47). Further, that in reaching its conclusion, the Board could consider offenses of which petitioner had been pardoned and even an offense in which the Court of Ap-

peals itself had reversed the conviction of petitioner and ordered him acquitted (R-47).

REASONS FOR ALLOWANCE OF WRIT

1. The questions presented have obvious importance in the administration of the Immigration and Nationality Act of 1952 (8 USC 1101 et seq) which have not been, but should be, settled by this Court.

2. The decision of the Court of Appeals that deportation hearings pursuant to Section 1252(b) 8 USC meet the currently prevailing standards of fairness and impartiality required in the Fifth Amendment is in conflict with the decision of this Court in *Wong Yong Sung vs. McGrath,* 339 U. S. 33.

3. The decision of the Court of Appeals that deportation proceedings pursuant to Section 1252 (b) 8 U.S.C. are not amenable to the provisions of the Administrative Procedure Act is in conflict with the decision of this Court in *Sung vs. McGrath, supra,* and *Rubinstein vs. Brownell,* D. C. Cir. 206, Fed. 2d 449, affirmed 346 U. S. 929.

4. The decision of the Court of Appeals that the case of petitioner was not prejudiced before or prejudged by the special inquiry officer and the Board of Immigration Appeals, by unfavorable publicity instigated by and the actions of the

Attorney General before any hearing is in conflict with the decision of this Court in U. S. ex rel *Accardi vs. Shaughnessey*, 347 U. S. 260.

SUMMARY OF ARGUMENT

1. Section 1252(b) 8 USC (66 Stat. 208) fails to meet the currently prevailing standards of fairness and impartiality required by the Due Process Clause of the Fifth Amendment in that (1) Investigative and prosecuting functions of the special inquiry officer are commingled with his adjudicative functions and (2) the special inquiry officer is responsible to the supervision of the Attorney General, officers, agents and employees of the service all engaged in the enforcement of the Immigration laws.

It has been held that "when the Constitution requires a hearing, it requires a fair one, one before a tribunal, which meets at least currently prevailing standards of impartiality" *Wong Yong Sung vs. McGrath* (1950) 339 U. S. 33; *Kwong Hai Chew vs. Colding* (1953), 344 U. S. 590. The currently prevailing standards of fairness and impartiality in deportation hearings are found in the Administrative Procedure Act, 60 Stat. 237, 5 USC 1001 et seq. and particularly in Sec. 5(c) 60 Stat. 237, 240, 5 USC 1004(c), *Sung vs. McGrath, supra.*

Section 1252(b) U.S.C. provides that the special inquiry officers functions are to present and receive evidence, interrogate, examine and cross examine the alien or witnesses. By regulation (8 C.F.R., 253 (d)) it may even become his duty to lodge an additional charge against the alien and

proceed to hear his own accusation. In such case, he is accuser, prosecutor and judge.

This was the practice so universally criticised and finally condemned in *Sung vs. McGrath*. Section 1252(b) attempts to avoid constitutional jeopardy by providing that the special inquiry officer is prohibited from conducting any case in which he participated in investigative and prosecuting functions, except as provided in the subsection. With these exceptions, it is obvious the so-called prohibition is one in name only and of no legal or practical effect.

The special inquiry officer is by law (Section 1001(b)(4) 8 U.S.C.; 66 Stat. 166) subject to the supervision of the Attorney General. By regulation, 8 C.F.R. 242: 51 he is subject to the immediate supervision of the district director, also an enforcement officer with investigative and prosecuting functions in immigration cases. Both the law and the regulation are in direct conflict with section 1004(c) 5 U. S. Code providing that no hearing officer shall be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. Here, the supervision and control of the special inquiry officer is not a presumption or assumption, but a mandate of the Act itself.

In the instant case, the supervision of the Attorney General of the special inquiry officer becomes a serious and vital question. On the arrest of petitioner, before any hearing, the Attorney General in the press, both in Washington and New Orleans, initiated prejudicial and unfavorable publicity concerning petitioner and his case. (Exhibit 7,

Hearing Feb. 16, 1953). There is, likewise, the charge in the habeas corpus petition that (Par. XII R. 8) that the name of petitioner appeared on the Attorney General's list of undesirable aliens he desired to deport, the same list at issue in the case of *Accardi v. Shaughnessey*, 347 U. S. 260.

Further, we find in the legislative history of the 1952, no discussion of the supervision of the inquiry officer by his superior officers, including the Attorney General, except the positive statements of both sponsors of the legislation that the "Sung case will be the law of the land when this Code is adopted (98 Cong. Rec. Per. Ed 4416) and "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now." (98 Cong Re. Per Ed. 5778, May 22, 1952).

It is petitioner's contention, therefore, that section 1252 (b) 8 U.S.C. fails to meet the currently prevailing standards for a fair and impartial hearing as required by the Fifth Amendment to the Constitution of the United States.

2. Administrative hearings in deportation cases must conform to the procedural requirements of the Administrative Procedure Act. *Sung vs. McGrath*, 339 U. S. 33. After that decision, Congress passed a rider to the Supplemental Appropriations Act, 1951, 64 Stat. 1048, providing "that proceeding under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. sec. 1004, 1006, 1008)". This rider or exemption has now been specifically repealed by the 1952 Immigration Act, 66 Stat. 279, 280, Sec. 403 (47) Immigration and Nationality Act of 1952. So the situation in administrative

hearings in deportation cases is the same as existed in 1950 when *Sung v. McGrath* was decided, namely, that deportation hearings are amenable to the procedural requirements of the Administrative Procedure Act. It will be contended that certain detailed provisions in section 1252(b) 8 U.S.C. have been substituted for the comparable provisions of the Administrative Procedure Act. However, a full consideration of the legislative history of the 1952 act will show that Congress had no such legislative intent. It was insisted by the sponsors that the Administrative Procedure Act applied to the bill. Senator McCarran stated on May 22, 1952, (a day later than his previous discussion of 1252 (b)): "The bill provides for Administrative Procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned." (98 Cong Rec. Per Ed 5779).

3. The deportation hearing given petitioner was unfair because there was absent elements deemed essential to due process as pointed out heretofore. The Court of Appeals held (R 43) the defects complained of must be such as to lead to a denial of justice. The Court did not consider the alternative infirmity found in the cited cases namely that an element deemed essential to due process be absent. Here we have a hearing officer subject to enforcement officers of the same agency and acting as investigator, prosecutor and judge, all contrary to the accepted standards for a fair hearing.

4. Sections 1251(a)(11) and Section 1251(d) 8 U.S.C., 66 Stat. 204 are retroactive in effect and violate the ex post facto Clause of the Constitution of the United States (Art. I, Sec. 9, Clause 3). Petitioner was convicted of a viola-

tion of the Marihuana Tax Act, Section 2591, 26 U.S.C. in 1938. At that time, such conviction was not a ground for deportation and was only made a deportable offense by the Act of June 28, 1940, 54 Stat. 673. However, this Act specifically exempted convictions for marihuana offenses prior to June 28, 1940. So in effect, petitioner was granted a congressional pardon. This status continued until December 24, 1952, the effective date of the 1952 Act, when all limitations were removed. Therefore, petitioner was caught completely unawares and suffered consequences for his offense of which he had not been adequately forewarned at the time of the commission of the offense.

5. The issuance of a confidential list of undesirable aliens, including the name of petitioner, by the Attorney General in 1952 and the prejudicial announcement, made by the Attorney General on petitioner's arrest on December 30, 1952, prejudged the case of petitioner before both the special inquiry officer and the Board of Immigration Appeals. The consequent failure of both to exercise their independent discretion is a denial of "due process." *U. S. ex rel Accardi v. Shaughnessey* (1954) 347 U. S. 260.

It was stated by the Court of Appeals that no evidence was in the record of the list or that petitioner's name was on it. The fact that the list existed and that petitioner's name was included was made both before the Board and in the petition of habeas corpus (Par XII R8). The hearing before the Board on May 11, 1953 will show no denial of these facts by the Department of Justice. The return to the writ (R 14-16) does not deny these facts. It will be recalled that in the Accardi case there was an affidavit denying the existence of the list. Here, in two instances, there

has been no such showing. Consequently, petitioner has done all that was required of him to sustain these allegations. Rule 12, Fed. Rules Civil Procedure. Likewise, the statement of the Attorney General on December 30, 1952, was a regular Department of Justice release. It flatly stated petitioner's "conviction is a deportable offense" under the new Act. It referred his arrest as "another step in the Attorney General's program for — deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

Could any subordinate hearing officer or Board be expected to thwart the orders of their superior?

ARGUMENT

I

SECTION 1252(b) 8 USC, 66 STAT 208 FAILS TO MEET THE CURRENTLY PREVAILING STANDARDS OF FAIRNESS AND IMPARTIALITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 1252(b) 8 USC, 66 Stat. 208 fails to meet the currently prevailing standards of fairness and impartiality required by the Due Process Clause of the Fifth Amendment in that:

(a) Investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions.

(b) The special inquiry officer is responsible to the supervision of the Attorney General, officers, agents, and employees of the service, all of whom are engaged in the enforcement of immigration laws.

The Fifth Amendment to the Constitution of the United States provides in part, as follows:

> "No person shall be deprived of life, liberty or property without due process of law."

Petitioner is an alien who was admitted for permanent residence in 1910. He may not be deprived of his right to remain in this Country until his deportability is established by law. The Japanese Immigrant Case 189 U. S. 86, 100-101; *Wong Yang Sung v. McGrath*, 339 U. S., 33, 49-50; *Kwong Hai Chew v. Colding*, 344 U. S., 590, 598.

The test to be met in determining the constitutionality vel non of this statute was established by the Supreme Court in the Wong Yang Sung v. McGrath case, supra, and cited with approval in the Kwong Hai Chew case, supra as follows:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal, which meets at least currently prevailing standards of impartiality." A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional

> standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

See *Galvan v. Press*, decided May 24, 1954, where this Court held "In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process."

It is our contention that the currently prevailing standards of fairness in deportation hearings are to be found in the applicable provisions of the Administrative Procedure Act. It is our further contention, as will be later discussed, that the provisions of Section 1252(b) must conform to the Administrative Procedure Act, but, if not subject to that Act, then 1252(b) violates the Due Process Clause of the Fifth Amendment since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" required in hearings.

The Court of Appeals decision admits "Clearly the procedure prescribed by 242 (b) does not accord with section 5(c) of the Administrative Procedure Act — — — " (R 37). It has already been shown in the summary of the argument that 1252(b) provides the same commingling of functions as was condemned in *Sung v. McGrath*. The Administrative Procedure Act did not require a complete separation of investigating and prosecuting functions from adjudicating functions. The safeguards the Act sets up were intended to ameliorate the evils from the commingling of functions as set up in Section 1252(b) of the 1952 Act.

"This commingling if objectionable anywhere, would seem to be particularly so in the deportation proceedings. — —".

I (b)

The 1952 Immigration Act by its terms makes the special inquiry officer responsible to the supervision of the Attorney General, officers, agents, and employees engaged in investigative and prosecuting functions for the agency. This enactment strikes at the heart of a fair and impartial hearing and violates the essentials of due process required by the Constitution.

Section 1101 (b) (4) Title 8, United States Code provides as follows:

> "(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General shall prescribe."

Section 1004 (c), Title 5, United States Code provides in part as follows:

> " —nor shall such officer be responsible to or subject to supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency."

The very first requirement of a special inquiry officer is that he shall be *"any immigration officer."*

It must, therefore, be assumed that such officer has in the past or is now performing investigative and enforcement duties relating to immigration or naturalization. Such are the common duties of immigration officers. Such is their normal training, especially if in the service for any particular length of time.

The test for a fair and impartial hearing in accordance with the generally accepted standards as set out in Section 5 (c) of the Administrative Procedure Act (5 USC 1004 (c)) is that hearing officers be removed from the supervision of officers performing prosecuting and investigative functions.

No standards of ability or competence is required by the act. The appointment of special inquiry officers is left to the whim of the Attorney General. Hearing officers enjoy no independence of status. Under the law they must be immigration officers. They are civil service officers and are subject to the normal powers of the Attorney General, as head of the Department of Justice, to appoint, compensate, rate, promote, and remove them.

The special inquiry officer is subject to the immediate supervision of the district director of the Immigration and Naturalization Service in administrative arrangements at the local level. By 8 CFR 242.51, the district director is given the power to assign deportation cases to the special inquiry officer for hearing. The district director is an enforcement officer with investigative and prosecuting functions.

In the instant case, common fairness demands that the special inquiry officer be divorced from the supervision of officers who are enforcement officers.

There has been wide-spread national prejudicial publicity given to the deportation of the petitioner. It has been demanded by Senate investigating committees, nationally syndicated columnists, and by the local press. It has been even demanded by the Attorney General in office at the time of his arrest, who announced in a special press release that the arrest of appellant was a part of a campaign to rid the country of undesirable alien criminals. This special press release also gave at length the alleged criminal record and activities of appellant. (Exhibit No. 7, Hearing Feb. 16, 1953). In fact, the press has stressed that certain portions of the present law were specially passed to deport appellant. Surely, in such circumstances the trial officer must be far removed from the supervision of enforcement officers.

The report of the President's Commission on Immigration and Naturalization, January 1, 1953, at page 162, succinctly points out the danger of such a situation, and says:

> "Under such an arrangement the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

It is submitted that under the terms of the 1952 Act and the Regulations promulgated thereunder, the special inquiry officer designated to hold the hearing was subject to the immediate control and supervision of enforcement officers of his service, exercising investigative and prosecuting functions in the agency. Further than that, he is subject, by the very terms of the Act, to the supervision and control of the highest officer engaged in such functions, the Attorney General.

Such procedures violate the basic and fundamental concepts of a fair and impartial hearing contemplated and required by the Constitution and laws of the United States. Thus petitioner was denied the rudimentary requirements of due process and elementary fairness.

II

ADMINISTRATIVE HEARINGS IN DEPORTATION CASES MUST CONFORM TO THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

The Court of Appeals held that "to the extent the proceedings prescribed by Section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter act are inapplicable to the deportation proceedings." (R 40). The Court also suggested that proceedings under

242(b) were exempted from the purview of the Administrative Procedure Act by reason of Section 7(a) (5 U.S.C. 1006(a)) of that act exempting "specified classes of proceedings — specially provided for or designated pursuant to statute."

Neither holding is tenable after the history of deportation hearings is studied.

The Sung case held squarely that administrative hearings in deportation proceedings were amenable to the Administrative Procedure Act and not exempted therefrom. After the decision a rider to the appropriation Act of 1951, (64 Stat. 1048) exempted deportation proceedings from the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act. This rider or exemption was specifically repealed by Section 403 (47) of the 1952 Act 66 Stat. 279-280. Section 242(b) or Section 1252(b) 8 USC states that it is "the sole and exclusive procedure for determining the deportability of an alien under this section." Let us now look at the legislative history of this section.

Senator Pat McCarran, co-sponsor of this legislation, addressed the Senate at length on the procedural requirements of the Act. See Bestermann's Commentary on the Act, 8 USCA 48, 49, 50. In that statement, it is admitted that the dual-examiner provisions of the Administrative Procedure Act are not complied with. Seeking to explain away the repeal of the rider, it is said (p. 49-50): "That exemption now has been repealed, but it is believed that the above quoted statement made by Senator McCarran fully reflects congressional intent regarding those procedural provisions

of the Act which are designated to provide a substitute for the comparable provisions of the Administrative Procedure Act (S USC Sec. 1001 et seq).

But did Senator McCarran regard such provisions as a substitute for the Administrative Procedure Act? We think not. Nor do we think Congress had that intent after hearing the sponsors of the legislation.

On May 22, 1952, the day after the discussed statement, the Senator said in debate on the bill:

> "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now - - -" (96 Cong. Rec. Per Ed 5778).

And the same day, May 22, 1952, in discussing the rider and section 1252(b), Senator McCarran stated:

> "I will say that the rider referred to was attached to the appropriation bill because the statement was made before the Appropriations Committee that it would cost a considerable sum of money to apply the Administrative Procedure Act to immigration matters. I discussed the subject at length yesterday. I will touch on it just a little if I may at this time. The bill would set aside the rider which was attached to the appropriation bill. *The bill provides for Administrative procedures and makes the Administrative Procedure Act applicable insofar as the Administration of the bill is concerned.*" (Emphasis supplied). (98 Cong Rec. Per Ed p 5779).

And in the House Representative Walter — co-sponsor of the bill, stated:

> " - - - I am sure that if the gentleman will look at Page 163, Paragraph 46, he will find that the law as it was before the House adopted the amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted." (Cong Rec Per Ed p 4416.)

Furthermore, the applicability of the Administrative Procedure Act to the present Immigration law has been confirmed by the Courts. In the case of *Rubinstein vs. Brownell*, 206 F. 2d 449 (June 11, 1953) the Court of Appeals, District of Columbia, reviews at length the historical background of the Act (p 452-455 inc.). In granting Rubinstein an injunction enjoining the Attorney General from arresting him pending a deportation hearing the Court decided the provisions of the Administrative Procedure Act where applicable to the 1952 Act citing the statement of Senator McCarran just quoted. (See 206 F 2d 455). This case was affirmed by Supreme Court January 11, 1954, by an equally divided Court, 346 US 929.

We would, therefore, submit that from the express repeal of the appropriation rider (64 Stat. 1048) by Section 403 (47) of the 1952 Immigration Act and by the positive statements of both of the sponsors of the bill that the provisions of the Administrative Procedure Act are "made applicable to the bill" and that "The Administrative Procedure Act prevails now."

The Administrative Procedure Act demands a separation of functions in hearing officers and freedom from control or supervision of enforcement officers of the same agency. The 1952 Immigration Act does not require either.

Cases upholding the dual capacity of a hearing officer, will be cited such as *US ex Harisiades v. Shaughnessey*, 342 U. S. 580; *Belizaro v. Zimmerman*, 3 Cir. 200 F. 2d 282; *Reynolds v. Dean*, 7 Cir. 68 F. 2d 346; *Palmer v. Ultimo*, 7 Cir. 69 F. 2d 1. An examination of these cases will show that they were decided before the enactment of the Administrative Procedure Act or while the exemption or rider was in effect. The Harisiades case shows the alien consented to such hearing. Here petitioner objected at the outset and only proceeded subject to that objection. (Hearing Feb. 16, 1953).

We submit the principles decided in the Sung case prevail and are now the "law of the land."

III

THE DEPORTATION HEARING GIVEN PETITIONER WAS UNFAIR BECAUSE THERE WERE ABSENT ELEMENTS DEEMED ESSENTIAL TO DUE PROCESS

The Court of Appeals decided (R 43) that the defects complained of must be such as to lead to a denial of justice. As authority for this holding, it cited seven cases in foot note 17. An examination of these cases will show that a hearing is also unfair if there is absent one of the elements deemed essential to due process. Petitioner is not com-

plaining because the rules of evidence or of judicial procedure were not adhered to. He claims that by failure to observe the currently prevailing standards for a fair hearing he has been deprived of due process of law. The violations of due process have already been pointed out. The elements deemed essential to due process have been shown to be absent. To paraphrase the language in the Accardi case, supra, it is not charged that the Attorney General ordered the special inquiry officer and the Board to deport petitioner. "It would be naive to expect such a heavy handed way of doing things." However it is charged that the statute places the special inquiry officer and the Board under the supervision of the Attorney General. It is further charged that where the Attorney General has initiated prejudicial publicity concerning the case of petitioner before any hearing and has indicated that he desires the deportation of petitioner as a person on his list of proscribed aliens, the consequence will be that "the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

IV

SECTIONS 1251(a)(11) AND SECTION 1251(d) 8 USC 66 STAT 204, ARE RETROACTIVE IN EFFECT AND VIOLATE THE EX POST FACTO CLAUSE OF THE CONSTITUTION OF THE UNITED STATES (ARTICLE 1, SECTION 9, CLAUSE 3)

This contention has been covered in the summary of the argument. This Court has recently decided the case of *Gal-*

van v. Press, May 24, 1954, holding that the ex post facto Clause is inapplicable to deportation proceedings. This case is different in that Congress for twelve years granted legislative immunity from deportation to petitioner.

The harshness of these retroactive provisions have been recognized by Congress and there is now pending before that body amendments placing a ten year limitation on such convictions. (Sec. 342(b)(3) HR 6820; S2585. P 94).

V

THE ISSUANCE OF A CONFIDENTIAL LIST OF UNDESIRABLE ALIENS, INCLUDING THE NAME OF PETITIONER, BY THE ATTORNEY GENERAL IN 1952, and PREJUDICIAL PUBLICITY, AT THE TIME OF PETITIONER'S ARREST, BY THE ATTORNEY GENERAL PREJUDGED PETITIONER'S CASE BEFORE THE SPECIAL INQUIRY OFFICER AND THE BOARD OF IMMIGRATION APPEALS.

It is our contention that the issuance and circulation by the Attorney General of a proscribed list of aliens to be deported and the press release by the same officer before any hearings had the effect of dictating the decisions of the hearing officer and the Board. The consequent failure of both to exercise their independent discretion is a denial of due process. *Accardi v. Shaughnessey* (1954) 347 US 260.

It has already been shown that there was no denial of the existence of the list and the inclusion of petitioner's name thereon. The failure of the respondent to deny the

allegation of the petition for habeas corpus (Par. XII R8) admits as true the allegation and dispenses with the necessity of proof by petitioner.

The press release by the Attorney General on December 30, 1952 is in the record as Exhibit No. 7. Hearing, Feb. 16, 1953. The Court of Appeals, although holding that an adherence to the rules of evidence is not required in deportation proceedings (R 43) attempts to invoke stringent rules of evidence with regard to the Attorney General's statement. There is no denial the Attorney General issued the statement. It was released simultaneously in Washington and New Orleans. The Court of Appeals states the clippings do not constitute evidence of the facts stated therein. The answer to this is that some of the facts stated therein are not true in fact and therefore are all the more detrimental to petitioner. The special inquiry officer had an opportunity to read them and while the articles may not be proof of the facts stated therein, they were available to the hearing officer. The press release stated in part:

> "Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Fla., and Jefferson Parish, La., has been arrested on a deportation warrant by the Immigration and Naturalization Service."
>
> "The arrest in New Orleans was the first major deportation move undertaken since the Immigration and Nationality Act became effective Dec. 24, 1952. The action was another step in the attorney general's program for a denaturalization and/or

deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

"Marcello born Feb. 6, 1910, in Tunis, Africa, entered the United States for permanent residence Oct. 7, 1910, at New Orleans. He allegedly is engaged in large slot-machine operations and other activities in Louisiana."

"The deportation warrant was based on his conviction in 1938 for a violation of the marijuana act."

"Such a conviction is a deportable offense under the new Immigration and Nationality Act. The action follows lengthy investigation by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the marijuana act was one of only two in his checkered career . . . "

The prejudicial effect of this publicity is obvious. The language of the release dove-tailed with the list of undesirable aliens to be deported when it stated: "The action was another step in the attorney general's program - - - for deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities." A further reading of the release will show clearly that it was intended to prejudice petitioner. It shows the deportation warrant was based upon a 1938 conviction. With this fact, why is mention made of persons "who are engaged in racketeering or other criminal activities" or is "allegedly engaged in large slot machine operations - - - "? These are

not deportable offenses, if true, and in no way remotely relate to the matter upon which the warrant was based. Further the article says: "Such a conviction is a deportable offense under the new Immigration and Naturalization Act." According to the Attorney General, the case of petitioner was settled and cut and dried at the time of his arrest. There can be no doubt of the damaging and prejudicial effect of the release on the hearing officer and the Board. This was not the "heavy handed way of doing things" but the practical and effective way.

The effect of the Attorney General's interest in the case of petitioner is further reflected by the unusual rapidity of decision. The hearing officer announced his findings in four days; the Board in twenty-two days, much prompter than the ordinary procedure.

The force of the publicity engendered by the Attorney General's statement and actions is further demonstrated by the reasons given by the Board for denying discretionary relief to petitioner. These reasons are found in the Board's decision (Appendix B p. XXXIII). They include the marijuana conviction, which could not be considered, a conviction before 1938 of which he was pardoned, and strangest of all, newspaper clippings rehashing the wild and reckless statements of the Kefauver Committee, calling him a "racketeer" "number one mobster in Louisiana" as evidence not of bad reputation but of bad character. Even the exercise of his constitutional privilege against self-incrimination which was justified by the Court of Appeals (196 F 2d. 437) is used to his prejudice.

As was said in the Accardi case, supra, "public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport."

The contention has been made that there has been a change in the office of Attorney General since the issuance of the list and the press release. It is a matter of common knowledge that the campaign instigated by the former Attorney General has been vigorously pursued by his successor. The New York Times of April 27, 1953, comments on this fact in an article headed "Deportation Drive Now Focused on 38 — Racketeer and Red 'Big Shots' Head List as Brownell Spurs Action of Predecessor."

We submit that the prejudice engendered by the issuance and circulation of the undesirable alien list and the press release amounted to the dictation and prejudgment of the decisions in the case of petitioners and this deprived him of due process under the law and regulations.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

WHEREFORE, your petitioner prays that a writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said

Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as to this Court may seem proper.

Dated June , 1954.

Carlos Marcello
Petitioner

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APPENDIX "A"

OPINION UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

No. 14718

CARLOS MARCELLO,

Appellant,

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 6, 1954.)

Before BORAH and RUSSELL, Circuit Judges, and DAWKINS, District Judge.

RUSSELL, Circuit Judge: Carlos Marcello, a resident alien, was arrested and taken into custody by the United States Immigration Inspector at New Orleans, Louisiana, on December 30, 1952, under a warrant issued pursuant to section 242[1] of the Immigration and Nationality Act of

[1] 66 Stat. 208, 8 U. S. C. A. 1252(a).

1952.[2] The warrant charged specifically that Marcello was subject to be deported under section 241(a)(11) of the Act[3] for the reasons set forth in the margin.[4] Pending a hearing, which was three times continued, the alien was released under bond. The hearing was held at New Orleans on February 16, 1953, at which time the alien interposed objections to further proceedings on constitutional grounds. During the course of the hearing the special inquiry officer advised the alien, through his counsel, of his right to apply for a suspension of deportation,[5] which application must be made during the hearing, according to applicable regulations.[6] Counsel stated that the alien did not wish to apply for such relief. The decision and order of the special inquiry officer, rendered February 20th, held that Marcello was deportable for the reasons stated in the warrant and ordered that he be deported from the United States in the manner provided by law.

After rendition of the decision and order of deportation, the alien filed a motion to reopen the hearing to permit him to apply for discretionary relief by suspension of deportation. This motion was denied by the special inquiry officer on the ground that "the motion failed to state any new facts to be proved at the reopened hearing." In argument before

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[2] 66 Stat. 166, 8 U. S. C. A. 1101, et seq.

[3] 8 U. S. C. A. 1251(a)(11).

[4] "The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

"The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress."

[5] 8 U. S. C. A. 1254(a)(5).

[6] 8 C. F. R. 242.54(d).

the Board of Immigration Appeals the alien renewed his claim of deprivation of constitutional process and in addition urged that his motion to reopen the hearing should be granted, "unless the Government is prepared to waive that technical objection and permit the application for suspension to be considered by the Board."

The Board of Immigration Appeals overruled the alien's objections to the proceedings before the special inquiry officer and his attacks against the constitutionality of such proceedings, but accepted his proposal to consider his application for discretionary relief on the record made before the hearing officer. It conceded arguendo that the alien could establish an " 'exceptional and extremely unusual hardship' case" and his "good moral character" and that

he would be able to establish all of the requirements essential to the invocation of its discretion,[7] but, for reasons[8] stated in its decision, the Board declined to grant such relief. The appeal was dismissed.

On June 2, 1953, the alien petitioned the district court for the writ of habeas corpus. The writ was issued and on June 5, 1953, a hearing was held at which time the alien

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[7]Footnote 5, supra.

[8]"As against any evidence that he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana, (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc.; and his refusal to testify before the Kefauver Committee.

"With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered. (Marcello v. United States, 5 Cir., 196 F. 2d 437). In *Mahler v. Eby, supra*, (264 U. S. 32), at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that 'the Attorney General *may, in his discretion*, suspend deportation * * *'. It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal."

offered in evidence the official record of the Immigration and Naturalization Service containing the full record of his deportation proceedings and rested without offering further evidence in support of the allegations of his petition. The district court, in an able memorandum opinion,[9] held the deportation order valid and accordingly entered judgment discharging the writ. From the order of dismissal, Marcello has taken this appeal.

There is no question but that under section 241(a)(11), *supra,* Marcello is subject to deportation. He does not deny that in October, 1938, he was convicted, on his plea of guilty to an indictment containing two counts, of violating the Marihuana Tax Act of 1937.[10] However, it is contended that the district court erred in discharging the writ of habeas corpus on the ground that section 242(b), *supra*, is violative of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because: (1) investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions and (2) such officer is amenable to the supervision of the At-

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[9]Reported at 113 Fed. Supp. 22.

[10]The appellant was given a general sentence of one year and one day imprisonment. He contends that since he was given a general sentence there was but one conviction, although the indictment related to two distinct transactions, therefore, the finding of the special inquiry officer that he was deportable on two grounds was unwarranted and prejudicial to him. He further submits that there is no valid law of the United States relating to "the illicit traffic in narcotic drugs", thus he could not have been, and was not, convicted of such an offense. Inasmuch as he was convicted of the "violation of (a) law or regulation governing or controlling the taxing", et cetera, of marihuana, which is a deportable offense under the statute, as charged in the warrant, admitted at the hearing and found by the hearing officer, we deem it unnecessary to this opinion to resolve these issues.

torney General whose responsibility it is to enforce the deportation statutes. He argues that sections 241(a)(11) and 241(d) of the Act, which authorize deportation for offenses committed prior to the effective date of the Act are unconstitutional as *ex post facto* laws in that they imposed an additional punishment for an act greater than the law annexed to the crime when it was committed. Finally, he contends that he was entitled to a hearing on his application for discretionary relief which was denied him.

As we understand appellant's argument, he urges that the proceedings prescribed by section 242(b) are subject to, but not in conformity with, the Administrative Procedure Act,[11] or, if not subject to the requirements of that Act, then section 242(b) is violative of the Due Process Clause of the Fifth Amendment, since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" necessary to constitute due process of law in administrative hearings. Clearly the procedure prescribed by section 242(b) does not accord with section 5(c)[12] of the Administrative Procedure Act, and we shall consider first the contention that in all respects the requirements of the Administrative Procedure Act are controlling.

It is not necessary for decision in this case to consider the broad proposition of whether deportation proceedings are subject to requirements of the Administrative Procedure Act[13] as concerns matters not expressly provided by

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[11] 5 U. S. C. A. 1001, et seq.
[12] 5 U. S. C. A. 1004(c).
[13] See Sung v. McGrath, 339 U. S. 33; Rubinstein v. Brownell, D. C. Cir., 206 F. 2d 449, affirmed by an equally divided court, 346 U. S. 929.

the Immigration Statute. Our investigation is limited to a determination of whether the proceedings provided for by section 242(b), which were followed in this case, are invalid because contrary to that Act. Prior to the enactment of the Immigration and Nationality Act of 1952, there was no express provision in the immigration law requiring that a hearing be granted a deportee. Such matters were left largely to be administered under regulations promulgated by the Attorney General. However, under the decisions of the Supreme Court,[14] the requirement for a fair hearing was necessarily implicit in the deportation statutes and such hearing was required to conform to the Administrative Procedure Act. Following the decision of the Supreme Court in the Sung case, Congress, by a rider to the supplemental appropriations bill enacted in September, 1950,[15] exempted "Proceedings under law relating to the exclusion or expulsion of aliens" from the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. This rider was repealed by the Immigration and Nationality Act of 1952, which specifically prescribed the procedure to be followed in deportation cases in section 242(b) thereof with a further provision that:

> "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

able to the requirements of the Administrative Procedure

pl[illegible]ant relies upon the decision in the Sung case to support his contention that deportation proceedings are amen-

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[14]Notably The Japanese Immigrant case, 189 U. S. 86, 101, and Sung v. McGrath, supra.

[15]64 Stat. 1048.

Act. However, at the time Sung was ordered deported Congress had prescribed no procedure to govern deportation proceedings. In the absence of such legislation the Supreme Court held that the hearing to which Sung was entitled under its prior decisions must conform to the Administrative Procedure Act. Since that time Congress has provided a "sole and exclusive" procedure for determining the deportability of an alien, and therefore, the Sung case is no longer applicable. The case of *Rubinstein v. Brownell*, footnote 13, *supra*, has no application here. It holds merely that a deportation order issued pursuant to the Immigration and Nationality Act of 1952 is subject to judicial review under section 10 of the Administrative Procedure Act.

In view of the plain language of the Immigration Statute, it is difficult to follow appellant's argument that the Administrative Procedure Act has the effect of nullifying the subsequent Act of Congress. He admits that section 242(b) reveals "an unmistakable attempt by Congress to exempt immigration proceedings" from the Administrative Procedure Act, but contends that it has failed to do so. The force of appellant's argument is that by some means the Administrative Procedure Act has the standing of a Constitutional Amendment and Congress is powerless to provide for administrative hearings which do not conform to it. Of course, there is no validity to such an argument.

Section 7(a) of the Administrative Procedure Act, 5 U. S. C. A. 1006 (a), exempts from the purview of that Act "specified classes of proceedings . . . specially provided for by or designated pursuant to statute." We are persuaded that this exemption is applicable to hearings held under section 242(b). Furthermore, and controlling here, even in the

absence of such provision, it was within the power of Congress to exempt such proceedings as those under review from the requirements of its creature, the Administrative Procedure Act. It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant. We hold, therefore, that to the extent the proceedings prescribed by section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings.

It is beyond question that an alien has no absolute right to remain in the United States. Congress has plenary power over aliens and may deport them from this country at any time for any reason, even on grounds nonexistent at the time of their entry. "Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry." *Carlson v. Landon*, 342 U. S. 524, 536. Permissible grounds of deportation of aliens is a matter, where not controlled by treaty, alone for Congressional determination, and controlled only by legislative considerations of international polity and comity. This power of deportation, as stated in a masterly discussion by Mr. Justice Jackson in delivering the opinion of the Court, is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades v. Shaughnessy*, 342 U. S. 580, 587 and see note 14, p. 588. As to the grounds or causes for deportation, the courts are not empowered to substitute their opinion for that of Congress and can properly determine only whether the existence of any prescribed ground of deportation has been fairly established. Thus an alien is not without rights for the due

process clause of the Fifth Amendment is available protection for alien and citizen alike. A resident alien, subject to expulsion and deportation under conditions which Congress may prescribe, may not be deprived of his constitutional right to procedural due process. *Chew v. Colding*, 344 U. S. 590. This includes the right to a fair hearing "before a tribunal which meets at least currently prevailing standards of impartiality." *Sung v. McGrath, supra.* Appellant insists, however, that the procedure provided for in section 242(b) falls short of the current conception of fairness and impartiality and in operation constitutes a deprivation of procedural due process for the reasons above indicated.

With respect to the contention that deportation proceedings must be measured by and equated to the Administrative Procedure Act we think it sufficient to say that we agree with the district court that the Administrative Procedure Act is not the sole criterion of due process of law. In reference to that Act, the Supreme Court, in *United States v. Morton Salt Company*, 338 U. S. 632, 644, observed that "It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights." While that case is not directly in point, we think that the observation is applicable here.

The reference which we have made to the "prosecutive" functions of the special inquiry officer[16] relate to his duties

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[16] "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this chapter to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this chapter, as the Attorney General shall prescribe." 8 U. S. C. A. sec. 1101(b)(4).

which partake of the nature of prosecution. Under the terms of the statute it is his duty to conduct the proceedings, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, to make determinations, including orders of deportation. No special inquiry officer is authorized to conduct a proceeding in any case in which he has participated in investigative functions, or except to the extent stated above, in prosecuting functions. Thus, a special inquiry officer is prohibited from sitting as arbitor in a case which he was responsible for investigating and his prosecutive functions are restricted to those enumerated. Furthermore, as additional assurance that the alien shall be accorded a fair hearing, determination of deportability in each case can rest only upon the record made before the special inquiry officer and shall not then be valid unless it is based upon reasonable, substantial and probative evidence. In addition to these safeguards, the alien must be given notice of the nature of the charges against him and the time and place where the proceedings are to be held; a reasonable opportunity to be present and to be represented by counsel; an opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.

A hearing in a deportation proceeding is not unfair merely because the rules of evidence and procedure applicable to judicial hearings are not adhered to. To render such a hearing unfair the defects complained of must be such as

to lead to a denial of justice. We find no such defect here.[17] Appellant does not deny that the requirements of the statute were complied with. He contends merely that under the prescribed procedure the administrative or executive officers are in a position to abuse their discretion or to be wrongfully influenced by matters outside the record. It is the deprivation of due process of law which is prohibited by the Fifth Amendment, not the opportunity to abuse due process. We are not at liberty to assume that the officers who are entrusted with the duty of administering the law will violate their trust or their statutory duty. In the event of such breach of duty, the alien will be fully protected by judicial process. See *Accardi v. Shaughnessy*, decided March 15, 1954, ... U. S. . . . .

In his petition, appellant urged that on the day of his arrest the Attorney General announced in a public statement that "your petitioner was an undesirable citizen (sic) and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner" and that such publicity "was bound to have great effect upon the special inquiry officer." It was also alleged that "the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list." These allegations were made in support of appellant's claim that he was prejudiced by reason of the special inquiry officer being subject to the su-

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[17]United States ex rel Harisiades v. Shaughnessy, 187 F. 2d 137, 141, and cases cited, affirmed 342 U. S. 580; Belizaro v. Zimmerman, 3 Cir., 200 F. 2d 282; Kieleman v. Crossman, 5 Cir., 103 F. 2d 292; Hays v. Hatges, 8 Cir., 94 F. 2d 67; Hays v. Zabariades, 8 Cir., 90 F. 2d 3; Reynolds v. Dean, 7 Cir., 68 F. 2d 346; Palmer v. Ultimo, 7 Cir., 69 F. 2d 1.

pervision of the Attorney General and was thereby deprived of a fair hearing. Although given an opportunity to do so, appellant made no attempt to substantiate these allegations. There is no evidence in the record that the Attorney General prepared a list of aliens whom he desired to deport or, of course, that appellant's name was among those listed. Likewise, the record is silent as to the alleged statement made by the Attorney General, except for six newspaper clippings which were exhibits at the deportation hearing in some of which the statement attributed to the Attorney General was reported. These clippings evidence only that there was unfavorable publicity concerning appellant's arrest and do not constitute evidence of the facts stated therein. Nevertheless, assuming that the Attorney General did make such a statement, in this case it could hardly be said to have prejudiced appellant or to have influenced the special inquiry officer's determination of deportability. This is not a case where closely contested factual issues were presented for determination. Appellant admitted that in 1938 he was convicted of violating the Marihuana Tax Act of 1937, therefore, his deportability under section 241 (a)(11) was established as a matter of law.

The contention that the provisions of section 241[18] are unconstitutional, null and void because they are *ex post*

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[18]Section 241(a)(11), 8 U. S. C. A. 1251(a)(11), provides that any alien who "is, or hereafter at any time after entry has been . . . convicted," et cetera, shall be deported upon order of the Attorney General. Section 241(d), 8 U. S. C. A. 1251(d), provides that with exceptions not pertinent here the provisions of the statute are applicable to all aliens belonging to any of classes enumerated in subsection (a) notwithstanding "(1) that such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

facto laws, violative of the provisions of Article 1, Section 9, Clause 3 of the Constitution of the United States, requires little discussion. It is too well established to admit of controversy that acts of Congress governing deportation are not subject to the constitutional prohibition against the passage of *ex post facto* laws.[19] Appellant suggests that the Supreme Court, given another opportunity to review its prior decisions, might reach a different result. However, those decisions are binding upon us and, even if were disposed to do so, which we are not, we have no power to overrule them.

This leaves for consideration appellant's contention that he was arbitrarily denied a hearing on his application for a suspension of deportation. The district court did not expressly rule on this issue, however, it is properly before us for decision. We have hereinbefore related the circumstances under which this application was belatedly filed, denied by the special inquiry officer and renewed before the Board of Immigration Appeals. Aside from the fact that the application was not timely filed, see *McKenzie v. Savoretti*, 5 Cir., 200 F. 2d. 546, by expressing his willingness to have the application considered by the Board without re-opening the hearing, appellant waived his objections to the overruling of his motions to reopen the hearing. Furthermore, upon considering the application as having been made before it, the Board viewed it as though appellant could have proved all of the facts alleged therein and treated

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[19]Harisiades vs. Shaughnessy, 342 U. S. 580, 594; United States ex rel Shaughnessy, 338 U. S. 521, 529; Mahler v. Eby, 264 U. S. 32; Bugajewitz v. Adams, 228 U. S. 585. See also Carlson v. Landon, 342 U. S. 524.

it for all purposes as a valid application for discretionary relief.

Appellant, apparently recognizing that he is hard pressed to show that he was prejudiced by the ruling of the special inquiry officer in view of his waiver, urges that the reasons given by the Board for denying discretionary relief are unsound. It is noted that this point was not raised by the petition in the trial court and that it is not even alleged here that the Board abused its discretion or failed to exercise it. *Caddeo v. McGranery*, D. C. Cir., 202 F. 2d. 807. The Board did not take "it upon themselves to decide that the appellant could not establish good character", as stated by appellant. Upon his express waiver of further hearing, the Board, considering the facts disclosed by the record, exercised its discretion and determined that the order of deportation should not be suspended.

It was not improper for the Board to consider appellant's prior convictions, his numerous arrests and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application. Although only three of his arrests resulted in convictions and, upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed[20] and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion.

It is urged by appellant that this court should consider the recent decision of the Supreme Court in *Accardi v.*

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[20]Marcello v. United States, 5 Cir., 196 F. 2d. 437.

Shaughnessy, supra, in arriving at a decision in this case. We find nothing in that opinion inconsistent with what we have held here. The court there held that when a measure of discretion is delegated to a subordinate officer or board, a petition alleging that such discretion was not exercised, or that the decision of such body was dictated by a higher authority, states a cause for relief and the petitioner is entitled to a hearing on that issue. In the present case appellant was given an opportunity to establish the allegations of his petition and made no effort to do so. In this situation he cannot be heard to complain.

The judgment of the district court is affirmed.

JUDGEMENT AFFIRMED.

A True copy:
Teste:

(SEAL)

(s) OAKLEY F. DODD
Clerk of the United States Court
of Appeals for the Fifth Circuit.

APPENDIX "B"

OPINION BOARD OF
IMMIGRATION APPEALS

JUN 1 — 1953

A-2669541—Miami

CARLOS MARCELLO or CALOGERO MINACARI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Esquire
204 Queen and Crescent Building,
New Orleans, Louisiana
and
Jack Wasserman, Esquire
Warner Building,
Washington, D. C.
(Heard May 11, 1953)

IN BEHALF OF SERVICE:

Sidney B. Rawitz, and Hyman Scher, Service Representatives
(Heard May 11, 1953)

CHARGES:

Warrant: Act of 1952—Convicted of violation of law relating to illicit traffic in narcotic drugs—Section 241 (a)(11)

Act of 1952—Convicted of violations of law governing taxing, etc., of marihuana — Section 241(a)(11)

Lodged: None

APPLICATION: Termination of proceedings or reopening of hearing

DETENTION STATUS: Released under bond

This case is before us on appeal from a decision of a Special Inquiry Officer dated February 20, 1953, directing the respondent's deportation.

The respondent is a 43-year-old male, native of Tunisia and apparently of Italian nationality, who has resided in the United States since October 7, 1910. He last entered during 1936 or 1937 after a visit of a few hours in Mexico. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The first count charged that on or about December 6, 1937, he feloniously transferred to another individual a quantity of marihuana, which transfer was not made pursuant to a written order on the required form, in violation of the Act of August 2, 1937 (26 U. S. C. 2591). Count two charged a similar unlawful transfer of marihuana on or about December 15, 1937.

By brief and at the oral argument, counsel raised a number of contentions. They assert that the hearing was unfair

because of adverse newspaper publicity resulting from a press release of former Attorney General McGranery at the time the immigration warrant of arrest was served and because members of the press were permitted to be present during the hearing before the Special Inquiry Officer. Counsel do not argue that there is any prohibition, either in the statute or in the regulations, against deportation hearings being open to the public, and we do not believe that either of the factors mentioned resulted in the preclusion of a fair hearing to the respondent. This is particularly so with respect to the issue of deportability in this case since there is no dispute as to the facts.

Another contention of counsel is that the hearing was void because of asserted failure to comply with the Administrative Procedure Act. They rely on Section 403(a)(47) of the Immigration and Nationality Act which repealed the provision of law exempting the Immigration and Naturalization Service from compliance with Sections 5, 7 and 8 of the Administrative Procedure Act. We have carefully considered the argument which was advanced and the excerpts from the speeches of Senator McCarran and Congressman Walter to which counsel referred. We believe that the following statement appearing in the Conference Report[1] is illuminating:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of

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[1]U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1754.

> economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

We think that the foregoing makes it abundantly clear that it was not intended that deportation proceedings should be subject to the specific provisions of the Administrative Procedure Act, but rather that the procedural requirements, laid down in Section 242(b) of the Immigration and Nationality Act, were considered by Congress to be within the pattern of the Administrative Procedure Act and to meet the standards of that Act. We doubt that Congress could have expressed this more clearly than it did by the use of the following language in Section 242(b): "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this Section." We hold that the procedure which was followed in the respondent's case was entirely in accord with that specified in Section 242(b) of the Immigration and Nationality Act and regulations made pursuant thereto, and that counsel's contention relating to the Administrative Procedure Act must be rejected.

Counsel also contend that the proceeding violates the due process and ex post facto provisions of the Constitution. It is true that the respondent committed the narcotic offense in December 1937 and that, when the word "marihuana" was added to the Act of February 18, 1931 by Section 21 of the Alien Registration Act of 1940, specific provision was made that no alien should be deportable by reason of such amendment for an act committed prior thereto. However, we con-

sider the situation as being no different from that existing in *Mahler v. Eby*, 264 U. S. 32 (1924). In that case, the aliens were convicted in 1918 and their deportation was sought under the Act of May 10, 1920. It was there contended that the Act of May 10, 1920 was an ex post facto law, because the offense had been committed prior to its enactment, and that the proceedings were without due process of law. These contentions were rejected, the Court stating that the inhibition against the passage of an ex post facto law applied only to criminal laws. The same contentions were again rejected in *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952). Hence, we find this contention of counsel to be without merit.

It is also argued by the respondent's counsel that Section 241(a)(11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. We agree that the savings clause contained in Section 405(a) of the Immigration and Nationality Act is very broad. Yet counsel has not cited any specific language in that Section on which they desire to place reliance. Our examination of Section 405(a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241(d) does, in fact, specifically provide as follows:

> Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior

> to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

For the proposition that Section 241(a)(11) cannot be given a retroactive application, counsel also argue that this paragraph distinguishes between narcotic offenses and marihuana offenses; that both charges cannot be sustained; that, if any charge can be sustained, it is the marihuana charge; and that there is no specific provision in the clause dealing with marihuana which would make it retroactive. We have been unable to find, in counsel's briefs or oral argument, any elaboration of their view that both charges cannot be sustained. We find no repugnance in these two charges. Section 241(a)(11) authorizes the deportation of an alien "* * * who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana, * * *."

The only difference in the two clauses quoted above, insofar as the question of whether they are retroactive is concerned, is that in the first clause appears the words "at any time" and these words do not appear in the second clause. Since the clause relating to narcotic drug addicts, which precedes the clauses quoted above, is prospective in operation, it is possible that the words "at any time" were inserted in the next clause to emphasize that it was retrospective, and that it was not considered necessary to again use this phrase in the last clause. The respondent's one conviction is within the purview of both clauses quoted above, that is,

he has been convicted of a violation of a law relating to the illicit traffic in narcotic drugs and *he has been convicted* of a violation of a law controlling the taxing of marihuana. In view of the foregoing, we conclude that the respondent is deportable on the two charges contained in the warrant of arrest.

Counsel also contend that, before a valid order of deportation can be entered, it is necessary that the place of deportation be designated. We must reject this contention on the basis of our decision in *Matter of R*, Int. Dec. 411, decided December 4, 1952, approved by Attorney General December 29, 1952.

The remaining question relates to the respondent's motion to reopen the proceeding to permit the filing of an application for suspension of deportation, which motion was denied by the Special Inquiry Officer. At the oral argument, the Service Representative contended that, because of the respondent's incarceration in a federal penitentiary from November 1938 to August 1939, he cannot meet the requirements of Section 244(a)(5) of the Immigration and Nationality Act.[2]

The pertinent portion of Section 244(a)(5) is as follows:

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[2]It might be argued that the words "assumption of a status" in Section 244(a)(5) should be construed, in the respondent's case, to mean the date when he assumed the status of a deportable alien, that is, on December 24, 1952 when the Immigration and Nationality Act became effective, and that he cannot prove physical presence and good moral character for ten years thereafter. The Service has not urged this interpretation, and we deem it unnecessary to discuss such an obviously strained construction.

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation * * * in the case of an alien who— * * * (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of *not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation*, and proves that during all of such period he has been and is a person of good moral character; * * *. (Italics supplied)

The Service, relying primarily on the word "immediately", contends that the italicized portion means that an applicant for suspension of deportation under paragraph (5) must establish physical presence and good moral character during a period of ten years *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation. Applying this contention to the respondent's case, it is claimed that, by the use of the word "immediately," the 10-year-period during which the requirements mentioned must be established commenced on December 6 or 15, 1937 (the dates when the offenses were committed) if we depend on the words "commission of an act," or on October 29, 1938 (the date of conviction) if we rely on the phrase "assumption of a status." Since it was not the commission of the offense, but the conviction, which constitutes a ground for deportation, we may disregard the dates December 6 or 15, 1937. The Service is contending that the respondent must establish

good moral character from October 1938 to October 1948 and that, since he was in prison from November 1938 to August 1939, he is precluded from meeting this requirement because of the provision contained in Section 101(f)(7) which is to the effect that no person shall be regarded as of good moral character if he has been confined to a penal institution for 180 days or more during the period for which good moral character is required.

Taking into consideration the phrase in Section 244(a)(5) reading, "during all of such period he has been and is a person of good moral character," we find that, if we were to adopt the construction urged by the Service, it would be tantamount to saying that the respondent must establish that he is now a person of good moral character and that he was a person of good moral character from 1938 to 1948 but that it is immaterial whether he was physically present in the United States or of good moral character from 1949 to 1952. In the case of an alien who became deportable in 1925, it would mean that he would have to prove physical presence and good moral character from 1925 to 1935 and that he need not prove such requirements from 1935 to 1952. Since there is an obvious ambiguity concerning the period during which such an applicant must establish physical presence and good moral character, we must construe the statute to give effect to the intention of Congress.

It is well settled that a case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning,[3] and that a statute should be

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[3] *Stewart v. Kahn*, 78 U. S. 493, 504 (1870).

construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute[4]. In addition, Section 244(a)(5) was specifically made applicable to persons deportable on criminal ground by the inclusion of paragraph (4) of Section 241(a), which paragraph relates solely to aliens convicted of crimes involving moral turpitude. Hence, Congress must have intended that reformed criminals should be in a position to apply for suspension of deportation. Yet, since almost all aliens of this class would probably be confined for over 180 days after becoming deportable, the effect of adopting the construction urged by the Service would be to virtually eliminate the possibility that a reformed criminal could ever apply for suspension under paragraph (5), regardless of whether twenty or thirty years had elapsed since he was released from prison and regardless of his complete rehabilitation since that time. Other rules of statutory construction, which are pertinent to our consideration, are that a law will not be strictly read if such reading would result "in the emasculation or deletion of a provision which a less literal reading would preserve"[5] and that a remedial statute should be construed liberally to carry out the purposes of its enactment.[6]

In determining the construction which should be placed on the statutory provision under consideration, we note that paragraph (1) of Section 244(a) requires physical presence and good moral character for "not less than seven

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[4]*Wilkinson v. Leland*, 27 U. S. 627, 662 (1829); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *Ozawa v. United States*, 260 U. S. 178, 194 (1922).
[5]*Markham et al. v. Cabell*, 326 U. S. 404, 409 (1945).
[6]*Stewart v. Kahn*, 78 U. S. 493, 504 (1870).

years *immediately* preceding the date of such application;" paragraph (2), "not less than five years *immediately* preceding his application;" paragraph (3), "not less than five years *immediately* following the commission of an act, or the assumption of a status, constituting a ground for deportation;" and paragraph (4), "not less than ten years after such entry and *immediately* preceding his application." In each of these paragraphs, as well as in paragraph (5), the word "immediately" was used in denoting the period during which physical presence and good moral character were to be proved. In paragraphs (1), (2) and (4), where the period is that preceding the application, the word "immediately" was appropriate and necessary to prevent any claim that proof of physical presence and good moral character during some earlier period would be a compliance with the statute. It is readily understandable that the framers of the legislation, having found it incumbent to employ the word "immediately" in three paragraphs, may have inadvertently inserted it in paragraphs (3) and (5) without recognizing that it might result in a construction contrary to the intended scope of this provision.

We have also observed that in both paragraphs (3) and (5), which are the two paragraphs relating to deportability on grounds arising subsequent to entry, the language used was identical with the exception that paragraph (3) specifies five years rather than ten years. In commenting on paragraphs (3) and (5), the following appears in House Report number 1365:[7]

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[7]U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, pp. 1717-1718

> The third category * * * provides for the adjustment of status * * * upon a showing of 5 years' continuous physical presence *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation, good moral character during that period * * * .
>
> The fifth category * * * provides for the adjustment of status * * * upon a showing of 10 years' continuous physical presence after the commission of an act, or the assumption of a status constituting a ground for deportation, good moral character during that period * * * .

The language quoted above is found in identical form at page 25 in Senate Report number 1137 relating to S. 2550. That Congress did not attach any particular significance to the word "immediately" in paragraph (3) and (5) is shown by the fact that in both the Senate and House Reports the word "immediately" was used in the comment on paragraph (3), and in both reports it was omitted with reference to paragraph (5), the specific provision with which we are here concerned.

While it might be argued that Congress was endeavoring to place certain added restrictions on the granting of suspension to persons of the criminal class, we do not think such an argument would be tenable. This would ignore the fact that precisely the same language is used in paragraph (3) which, by its terms, does not apply to persons of the criminal class. Furthermore, if we were to adopt the construction urged by the Service, we would have to apply the same rule under paragraph (3) which would mean that

such an alien would be forever precluded from applying for suspension if, during the first five years after becoming deportable, he committed some act which militated against the establishment of good moral character, but that he would not be barred if the same act or a more serious offense were committed after the expiration of five years.

In analyzing the provisions of paragraphs (2) to (5) inclusive of Section 244(a), we find that paragraphs (2) and (4) require a specified period of physical presence and good moral character immediately preceding the application, and that paragraphs (3) and (5) require such a period following the date that an alien became deportable. Paragraphs (2) and (4) relate to aliens excludable at the time of entry and such an alien would, therefore, be subject to deportation immediately following entry. Hence, the requirement in paragraph (2) of five years' physical presence after the last entry would also constitute a requirement that five years must have elapsed after the date the alien became deportable. The same situation exists with respect to paragraph (4) in which there is a specific statement relating to "ten years *after such entry*." It is clear from the language of paragraphs (3) and (5) that a period of five or ten years must elapse after the date the alien became deportable. However, this requirement could not have been incorporated in paragraphs (3) and (5) merely by requiring proof of physical presence and good moral character for either five or ten years prior to the application, for in that case a person who had been physically present in the United States for five or ten years and who then became deportable could immediately apply for suspension of deportation, assuming that he was also able to establish good moral character.

After carefully reviewing the legislative history and Section 244(a) in its entirety, we believe that in paragraphs (2) to (5) Congress was concerned with two requirements: (a) that physical presence and good moral character must be proved for five or ten years preceding the application and (b) that five or ten years must elapse after the alien became deportable and before he might apply for suspension. It is our considered opinion, therefore, that paragraph (5) must be construed as requiring that, before an application for suspension may be submitted, at least ten years must have elapsed after the grounds for deportation arose, and that during the ten years immediately preceding the application, the alien must prove continuous physical presence in the United States and good moral character. In view of the foregoing, we conclude that the respondent is not barred from applying for suspension of deportation merely because he was confined in a penal institution during the period from November 1938 to August 1939.

As previously indicated, the respondent's motion to reopen the proceedings in order to permit the filing of an application for suspension of deportation was denied by the Special Inquiry Officer. The latter's order indicates that he took this action because he had informed counsel at the hearing that applications for suspension of deportation or voluntary departure might be submitted and counsel declined to apply for either of these forms of relief. (pp 24, 25). Because of the failure to make timely application for suspension of deportation, the record is not as complete as might be desirable. At the oral argument (p. 5), the respondent's counsel stated that he believed that the hearing should be reopened unless the Service was prepared to permit the application for suspension to be considered by us

notwithstanding the fact that no formal application had been made at the hearing. Under the circumstances, we will proceed to a consideration of whether suspension of deportation should be granted in this case.

Counsel is aware that 8 CFR 244.3 permits the consideration of confidential information, under certain circumstances, in connection with the question of whether voluntary departure or suspension of deportation should be granted. However, in the respondent's case, we have no knowledge as to whether the Service has a confidential file and we will consider only the record, consisting of the hearing and exhibits, in reaching a decision.

In the motion to reopen, it was asserted that the respondent first entered the United States at the age of 10 months; that he has been a person of good moral character during the last ten years; and that his deportation would result in exceptional and extremely unusual hardship to the alien, his citizen wife and four minor citizen children. At the hearing, the respondent testified that he is in the real estate business and the coin operated music box business. Counsel did not set forth, in his motion, any facts which would indicate that the respondent's deportation would, in fact, result in exceptional and extremely unusual hardship to the alien or to his wife or his children. We must take cognizance of the fact that both committees, in their reports to Congress on their respective bills (S. 2550 and H. R. 5678), stressed the restrictive purpose of the phrase "exceptional and extremely unusual hardship." The following appears at p. 25 in Senate Report number 1137 on S. 2550, 82nd Congress, 2nd Session, and, with the exception of the last three sen-

tences, is contained in almost identical form in the House Report:[8]

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation, the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien

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[8]House Report number 1365 in U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1718.

> would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

While we doubt that the alien could establish that his is an "exceptional and extremely unusual hardship" case and while there may well be some question whether he could establish good moral character, we will assume, for the purpose of this decision, that he would be able to establish all the requirements specified in Section 244(a)(5) of the Immigration and Nationality Act. As against any evidence he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, "number one mobster in Louisiana," etc.; and his refusal to testify before the Kefauver Committee.

With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the an-

swers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered.[9] In *Mahler v. Eby, supra*, at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that "the Attorney General *may, in his discretion,* suspend deportation * * * ." It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

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[9]Marcello v. United States, 196 F. 2d 437, CA 5 (1952).

APPENDIX "C"

OPINION AND ORDER
SPECIAL INQUIRY OFFICER

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A2 669 541 New Orleans March 4, 1953

In re: CARLOS MARCELLO, or, Calogero Minacari

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

CHARGES:

WARRANT: Immigration and Nationality Act of 1952 —Convicted of the violation of a law relating to the illicit traffic in narcotic drugs;
Immigration and Nationality Act of 1952 —Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana

XXXVI

LODGED: None

APPLICATION: Motion to reopen

DETENTION STATUS: Released under $5,000 bond.

WARRANT OF ARREST SERVED: December 30, 1952.

DISCUSSION: This record relates to a 43-year old married male, a native of Africa, a citizen of Italy, who last entered the United States at Laredo, Texas during 1936 or 1937. Hearing in this matter was conducted at New Orleans, Louisiana February 16, 1953 and on February 20 the alien was ordered deported on the grounds that he had been convicted of the violation of a law relating to the illicit traffic in narcotic drugs and that he had been convicted of the violation of laws governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana. Counsel for the alien has now submitted a motion for the reopening of this proceeding in order to allow the alien to apply for suspension of deportation. This motion will now be considered.

Counsel contends that the alien is eligible for suspension in that more than ten years has elapsed since the commission of the act constituting grounds for deportation; that he has been a person of good moral character during that period; that he first entered this country at the age of ten months and has resided here since that time and that his deportation would result in exceptional and extremely unusual hardship to the alien, his wife, and four minor children. The record of hearing shows clearly that the alien has resided in the United States since 1910, with the exception of a brief visit to Mexico in 1937. The record further

shows that the alien is married to a native-born citizen of the United States and that they have four native born children. No inquiry was made with regard to the alien's character or to any hardship that might result from the alien's deportation as no application for any form of relief was made at the time of the hearing. The following testimony is taken from the hearing record:

Question by Special Inquiry Officer to attorney: "Mr. Orchard, the regulations provide that at any time during the hearing the Special Inquiry Officer may advise the alien and his counsel of any relief for which they make application. At this time I wish to advise you that you may, if you desire, submit in behalf of the respondent an application for suspension of deportation based upon residence in the United States. In this case it would be ten years subsequent to the commission of an act constituting grounds for deportation, provided, of course, that he is able to establish that he has been a person of good moral character during that entire period and that his deportation would result in exceptionally and extremely unusual hardship either to himself or to a citizen or resident alien spouse or child. Further, you may, if you desire, submit in behalf of the respondent an application for the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided that the respondent is able to establish that he has been a person of good moral character for the past five years or longer. Do you understand these various forms of relief?" Answer: "Yes."

Question: "Do you wish to make an application for either or both of these forms of relief?" Answer: "No, Sir." (p.p. 24, 25).

Counsel apparently clearly understood the nature of the relief for which he might apply and he declined to make any application. He has set forth nothing in his motion to indicate any new facts or evidence that were not developed at the time of the hearing. The time to make application for suspension of deportation was during the hearing when the alien and his attorney were advised that such application might be made. The fact that counsel has changed his mind and now wishes to make an application is not sufficient grounds to order the hearing reopened. The motion to reopen will be denied on the grounds that the motion failed to state any new facts to be proved at the reopened hearing.

ORDER: It is ordered that the motion to reopen be denied.

(s) FRED P. McCLESKEY
Fred P. McCleskey
Special Inquiry Officer

FPM: mi

APPENDIX "D"

OPINION AND ORDER OF SPECIAL INQUIRY OFFICER

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A2 669 541 New Orleans February 20, 1953

In re: CARLOS MARCELLO, or, Calogero Minacari

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

CHARGES:

WARRANT: Immigration and Nationality Act of 1952 —Convicted of the violation of a law relating to the illicit traffic in narcotic drugs;
Immigration and Nationality Act of 1952 —Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

LODGED: None

APPLICATION: None

DETENTION STATUS: Released under $5,000 bond.

WARRANT OF ARREST SERVED: December 30, 1952.

DISCUSSION: This record relates to a 43-year-old married male, born in TUNIS, AFRICA, of Italian parents. While his testimony indicates doubt as to his citizenship, he testified that his mother and father were both born in Italy and that his father was naturalized in the United States about 1942. He appears to have acquired Italian citizenship at the time of birth by virtue of birth to Italian parents. This is substantiated by the fact that he was classified as a citizen of Italy at the time of his original entry into the United States. He originally entered the United States at New Orleans, Louisiana, October 7, 1910, when he was admitted as an immigrant alien. This entry has been verified, (Ex. 3). He last entered at Laredo, Texas, during 1936 or 1937 after a visit to Mexico of one to two hours. He testified that this trip to Mexico is the only time that he has been out of the United States since his original entry in 1910.

Counsel for the Respondent has made numerous objections and has excepted to the rulings of the Special Inquiry Officer. These objections will be discussed at this time before proceeding with the discussion of the charges against the alien.

Counsel objected to the presence of newspaper reporters at the hearing. He pointed out that the Law does not provide for either an open or closed hearing and contends that it is not customary for the press to be present at deportation hearings. While the Immigration and Nationality Act makes no provisions for either open or closed deportation hearings, Section 236(a) of the Act provides for the conduct of exclusion hearings "separate and apart from the public." The omission of this wording in the section pertaining to deportation hearings would indicate that the Act does not contemplate that these hearings will be closed proceedings. Counsel's objection was overruled, and the newspapermen were permitted to be present throughout the proceeding.

Counsel objected to the entire proceedings on the ground that Section 242(b) of the Immigration and Nationality Act is unconstitutional, null and void in that it does not meet the requirements or standards for a fair and impartial hearing and is violative of the provisions of the Administrative Procedures Act. In support of this objection he has submitted a brief wherein he sets forth at length the reasons for his objection, (Ex. 8). Counsel in his brief points out that the Supreme Court in the case of *Wong Yang Sung v. McGrath (Feb. 20 and Mar. 13, 1950, 339 U. S. 33, 908)* held that deportation proceedings against the alien were amenable to the Administrative Procedures Act. He further points out that Congress on September 27, 1950, negated this Supreme Court decision by exempting exclusion or expulsion of aliens from the provisions of the Administrative Procedures Act. Further, that this Act has now been specifically repealed by the Immigration and Nationality Act of 1952. He contends that Section 242(b)

of the Act does not meet the requirements for fairness and impartiality required by the Constitution and Laws of the United States because the investigative and prosecuting functions of the Special Inquiry Officer are commingled with his adjudicative functions and, further, the Special Inquiry Officer is responsible to the supervision of officers and employees of the Service engaged in the performance of investigative and/or prosecutive functions for the agency. Section 242 of the Immigration and Nationality Act provides for the apprehension and deportation of aliens. Paragraph (b) of that Section provides that a Special Inquiry Officer shall conduct proceedings under this Section to determine the deportability of any alien. It provides that determination of deportability in any case shall be made only upon a record made in a proceeding before a Special Inquiry Officer at which the alien shall have reasonable opportunity to be present. It provides that proceedings before a Special Inquiry Officer shall be in accordance with such regulations as the Attorney General shall prescribe and that such regulations shall include requirement that, (1) the alien be given notice reasonable under all the circumstances of the nature of the charges against him and of the time and place at which the proceedings will be held; (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings as he shall choose; (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. All of these requirements have been met. Section 242(b) also provides,

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

The provisions of the Administrative Procedures Act does not apply to these procedures. The procedure for determining the deportability of an alien is by law vested in the Immigration Service and that procedure is the sole and exclusive procedure for determining deportability. 8 CFR 9.1(b) reads, "The designation and appointment of Special Inquiry Officer. The Commissioner may designate, elect, and appoint as a Special Inquiry Officer any Immigration officer whom he deems specially qualified to exercise the powers and perform the duties of a Special Inquiry Officer as set forth in the Immigration and Nationality Act and this chapter. The Commissioner shall issue to each officer so appointed a certificate under his signature bearing a seal of the Service, such certificate shall state and shall be accepted in any proceedings as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration and Nationality Act and in this chapter." The attorney attempted to examine the Special Inquiry Officer and has objected to the refusal of the Special Inquiry Officer to allow himself to be placed under examination. The certificate of designation of Special Inquiry Officer signed by the Commissioner was presented to the attorney for his examination. Regulations provide *"such certificate shall state and shall be accepted in any proceeding as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration*

and Nationality Act and in this chapter." The Special Inquiry Officer is not required by law or regulations to submit himself to questioning by any attorney who wishes to challenge his designation as an Inquiry Officer. He is only required to submit a certificate issued by the Commissioner and bearing the seal of the Service to show that he has been designated and appointed as a Special Inquiry Officer. The record shows that the attorney did examine the certificate and was aware of the fact that the Special Inquiry Officer presiding at this hearing had been duly designated and appointed. Counsel further points out that the Special Inquiry Officer in conducting proceedings under the Immigration and Nationality Act is required to present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, as well as lodging and developing additional charges against the alien. He contends that this is prosecuting and investigative functions. It might be pointed out that in the instant case, an Examining Officer was assigned. Counsel also contends that the Special Inquiry Officer is unable to conduct a fair and impartial hearing because he is subject to the supervision of the Attorney General. He contends that the Inquiry Officer has been unduly influenced by newspaper articles released by the Attorney General and Immigration officials. Most of these objections made by the attorney were raised in the *Matter of D-A5 390 614 (Int. Dec. 339) (June 18, 1951) (December 26, 1951.)* The attorney in that case objected to the Hearing Examiner because prior to his appointment the Hearing Examiner had for fourteen years or more served in various positions in the Service which included functions in an investigative, prosecutive, and supervisory capacity. The Board held, "Granted that this is so, however, we fail to see why it should be cause for disqualification. If

counsel's line of argument were pursued to a logical conclusion, no prosecuting attorney could ever be permitted to serve as a judge on the theory that having once engaged in prosecutive functions such a person would be unable to conduct a fair and impartial hearing as a judicial officer." The Board pointed out that the important point was whether or not the Hearing Examiner had at any time in the past acted in an investigative or prosecutive capacity in that particular case. In the instant case, the Special Inquiry Officer was not asked the question as to whether or not he might have acted in an investigative or prosecutive capacity in this case. Had that question been asked, the answer would have been "no". The attorney in the *D——— matter*, supra, contended that the Hearing Examiner, although appointed under the Administrative Procedures Act, was subject to the Loyalty Act and was bound to be under pressure in order to protect his employment. The Board ruled, "To accept this argument as valid would be tantamount to declaring that Government employees are so pervaded with fear and so intimidated that they are incapable of passing a fair and honest judgment in any matter involving a subversive issue." While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Special Inquiry Officer in his conduct of hearings other than that they be conducted in accordance with the Law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that the decision rendered by the Special Inquiry Of-

ficer be rendered strictly in accordance with the evidence presented at the hearing.

Counsel has objected to this proceeding on the ground that Section 241(a)(11) of the Immigration and Nationality Act is unconstitutional, null and void, being ex post facto law violative of Article 1, Section 9, Clause 3 of the Constitution of the United States. This issue has been well settled by the Supreme Court in numerous decisions. In one of the leading cases, the Court stated, "However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades v. Shaughnessy 342 U. S. 580, 72 S. Ct. 512 (1952)* and cases cited therein. Counsel also cites the Harisiades case in his brief in support of his objection to this proceeding but states that they do not fall within the same category. He contends that the Respondent was caught unaware by the change in the Law and was not adequately forewarned of the consequences of his prohibitive acts. Certainly, the alien must have been aware of the possibility of criminal prosecution at the time that he committed these acts. The Supreme Court did not say that their decision in the Harisiades matter would have been other than the one rendered if the alien had not been adequately forewarned that his conduct was prohibitive and forewarned of its consequences. They merely pointed out that in that case he was adequately forewarned. The Supreme

Court in the Harisiades case stated, "It is contended that this policy allows no escape by reformation. We are urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon. We can not do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation." Subsequent to the rendering of that opinion the Immigration and Nationality Act became effective. Section 244 (a) (5) of that Act provides that the Attorney General may in his discretion suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence in the case of an alien who is deportable under various criminal grounds for an act committed or status acquired subsequent to entry into the United States, provided the alien has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act constituting a ground for deportation and has been a person of good moral character during all that period of time. The Act also provided that an alien who fell within that category might be granted the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided, he had been a person of good moral character for five years immediately preceding his application for voluntary departure. The Respondent and his attorney were advised of this form of relief and declined to make application, (p. 25).

Counsel requested a postponement of any further action in this proceeding in order to give him an opportunity to request judicial review in accordance with Section 10 of the Administrative Procedures Act. This motion was denied

on the ground that Section 242 of the Immigration and Nationality Act sets forth the procedure determining deportability of an alien and that the procedure so prescribed is the sole and exclusive procedure for determining the deportability of an alien. The Law is certainly clear in this regard, and there appears to be no reason for any further discussion of this particular issue.

Respondent's final objection was to the warrant of arrest on the ground that the warrant contains two offenses where there has been only one conviction. The warrant of arrest was issued pursuant to Section 241(a)(11) of the Immigration and Nationality Act.

> "Section 241(a). Any alien in the United States (including alien crewmen) shall upon the order of the Attorney General be deported who—
>
> (11) is or hereafter at any time after entry has been, a narcotic drug addict, or who has at any time been convicted of a violation of any law or regulations relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulations governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, cocoa leaves, heroin, marihuana, any sort of derivative, or preparation of opium

or cocoa leaves or isonipecaine, or any addiction forming or addiction sustaining opium."

The charges in the warrant of arrest are that he has been "convicted of the violation of a law relating to the illicit traffic in narcotic drugs," and "convicted of a violation of the law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana." Both of these charges are contained in paragraph 11. They both stem from a conviction under the Marihuana Act of August 2, 1937. He is not charged with being deportable because of two convictions but he is charged with being deportable on two different deportation charges.

Counsel for the Respondent and the Examining Officer concurred in offering into evidence a record of a sworn statement previously made by the Respondent before an Immigration officer. The Respondent in this statement testified as to his nativity and to his residence in the United States. He also testified with regards to several arrests as shown by a Federal Bureau of Investigation report exhibited to him at that time. He testified that he was arrested by the New Orleans Police Department on March 28, 1938, for narcotic violation and held for Federal authorities, (Ex. 2). The Respondent was questioned during the hearing with regards to this arrest and identified certified court records consisting of certified copies of Indictment, Conviction, and Sentence in the case of CARLOS MARCELLO in the United States District Court, Eastern District of Louisiana, New Orleans Division, on April 25, 1938, as pertaining to him. He further stated that he was convicted and sentenced as shown in the court record, (p. 19, Ex. 4). No objection was made to the introduction of the court record,

and the alien does not deny his conviction and sentence at that time. The Indictment in this matter is for violation of the Marihuana Tax Act of 1937. The first count to the Indictment reads, "That one Carlos Marcello . . . on or about the 6th day of December, 1937, at New Orleans Louisiana . . . did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana, to wit, sixty-three and one-half (63½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Act of August 2, 1937." Count 2 reads "Carlos Marcello . . . on or about the 15th day of December, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, remedy, derivative, and preparation of marihuana, to wit, three hundred sixteen and one-half (316½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcelio on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States as required by Act of August 2, 1937." The Respondent pleaded guilty to these charges in the District Court of the United States, Eastern District, Louisiana Division, on October 29, 1938, and was convicted on his plea of guilty of the offense charged in the Indictment, to wit: "Violation of the Marihuana Tax Act, 1937". He was sentenced to imprisonment for a period of one year and one day, (Ex. 4).

There is no question of the fact that the alien was convicted October 29, 1938, and sentenced to imprisonment for a period of one year and one day for violation of the Marihuana Tax Act of 1937. The only issue is whether or not he is now deportable under the Immigration and Nationality Act of 1952. Section 241(d) of the Act provides,

> "except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act."

The first charge in the warrant of arrest is that the alien has been convicted of a violation of law relating to the illicit traffic in narcotic drugs. Counsel has pointed out that at the time of the alien's conviction for violation of the Marihuana Act of 1937, his conviction was not included among the deportable offenses set out in section 156(a) Title 8 U. S. C.; that on June 28, 1940, Congress amended that section and added convictions of violations of marihuana laws to the other deportable offenses contained therein. Counsel contends that narcotic drugs and marihuana are treated under separate chapters in the Internal Revenue Code and that marihuana has never been made a narcotic by special order of the President of the United States. Chapter 23 of Title 26, Internal Revenue Code, relates to narcotics. Sub-chapter (a) pertains to "opium and cocoa

leaves." Sub-chapter (b) pertains to "opium for smoking." Sub-chapter (c) pertains to "marihuana." Marihuana is treated as a narcotic under the Internal Revenue Code. The Act of February 18, 1931, providing for deportation of aliens convicted for violation of any law regulating traffic in narcotics was amended June 28, 1940, to add marihuana to the list of narcotics contained in that Act. The Respondent has been convicted of the violation of a law that relates to the illicit traffic in narcotic drugs, to wit: Marihuana. Accordingly, he is deportable on the first charge contained in the warrant of arrest.

The second charge in the warrant of arrest is that the alien has been "convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana." The offense stated in the Indictment to which the Respondent pleaded guilty was that he did "unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana." The wording of the Indictment leaves no question of the fact that the alien is clearly deportable on the second charge contained in the warrant of arrest. Both charges in the warrant of arrest are clearly sustained.

The Respondent originally entered the United States in 1910 and with the exception of the one brief visit to Mexico has remained in the United States continuously since that time. He is married to a native born citizen of the United States and has four native born children. He was offered an opportunity to apply for discretionary relief but declined to make application. The record shows that he was arrested in 1929 and charged with "accessory before and after fact,

assault and robbery, Canal Bank, Algiers, Louisiana" — the charges were dismissed. He was arrested in 1930 and charged with assault and robbery, sentenced to nine to fourteen years in the penitentiary. He received a pardon for this offense from the Governor of the State of Louisiana on July 16, 1935. He was arrested in 1935 for a violation of the Internal Revenue Laws and the case was dismissed. He was convicted about August 20, 1951, in the District Court of the United States in New Orleans for contempt of Congress. This conviction was reversed by the Court of Appeals for the 5th Circuit. The Respondent has refused to specify any country to which he should be deported.

FINDINGS OF FACT: Upon the basis of all the evidence presented, it is found:

1. That the respondent is an alien, a native of TUNIS, AFRICA, a citizen of Italy;
2. That the respondent entered the United States for permanent residence at New Orleans, Louisiana, October 7, 1910;
3. That the respondent last entered the United States at Laredo, Texas, during 1936 or 1937;
4. That the respondent was convicted in the District Court of the United States, Eastern District of Louisiana Division, on October 29, 1938, on his plea of guilty of the offense of "violation of the Marihuana Tax Act of 1937";
5. That the offense for which the respondent was convicted was a violation of a law relating to the illicit traffic in narcotic drugs;
6. That the offense for which the respondent was convicted was a violation of a law governing and

controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

CONCLUSIONS OF LAW: Upon the basis of the foregoing findings of fact, it is concluded:

1. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress;

2. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

(s) FRED P. McCLESKEY
Fred P. McCleskey
Special Inquiry Officer